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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 51

THE FIRST NATIONAL BANK OF LOGAN, LOGAN, UTAH, A NATIONAL BANKING ASSOCIATION, PETITIONER

v.

WALKER BANK & TRUST CO., A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73

FIRST SECURITY BANK OF UTAH, N.A., PETITIONER

v.

COMMERCIAL SECURITY BANK

No. 88

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

COMMERCIAL SECURITY BANK

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the court of appeals in No. 51 (Logan R. 48–56)[1] is reported at 352 F. 2d 90, and the

[1] The reference "Logan R." is to the printed record in this Court in No. 51. Similarly, the record in No. 73 will be referred to as "First Security R.", and the record in No. 88 as "Saxon R."

opinion of the district court (Logan R. 37–45) at 234 F. Supp. 74. In Nos. 73 and 88, the court of appeals issued no opinion other than its judgment (First Security R. 35–36, Saxon R. 38–39), which is unreported, and the opinion of the district court (First Security R. 25–33, Saxon R. 28–36) is reported at 236 F. Supp. 457.

JURISDICTION

The judgment of the court of appeals in No. 51 was entered on October 26, 1965 (Logan R. 57), and a petition for rehearing denied on December 3, 1965 (Logan R. 58). The petition for a writ of certiorari was filed on January 4, 1966, and granted on May 2, 1966 (Logan R. 58, 384 U.S. 925). In its order allowing certiorari, this Court directed that No. 51 be consolidated with Nos. 73 and 88.

In Nos. 73 and 88 (which were consolidated below), the judgment of the court of appeals was entered on November 18, 1965 (First Security R. 35–36, Saxon R. 38–39). In No. 73 the petition for a writ of certiorari was filed on February 11, 1966, and granted on May 2, 1966 (First Security R. 36, 384 U.S. 925). In No. 88, Mr. Justice Fortas on February 16, 1966, extended the time for filing a petition for certiorari to and including March 16, 1966 (Saxon R. 39). The petition was filed on March 16, 1966, and granted on May 2, 1966 (Saxon R. 40, 384 U.S. 925).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

The National Bank Act authorizes the Comptroller of the Currency to approve the establishment of new

branches by a national bank within its home municipality if such establishment is authorized to State banks by the laws of the State where the national bank is located (12 U.S.C. 36(e)(1)). The question presented is whether, in authorizing the establishment of a branch office by a national bank, the Comptroller is bound by a provision of the laws of the State in which the national bank is located that permits State banks to establish branches in cities and towns anywhere in the State, but only by taking over existing banks.

STATUTES INVOLVED

The statutes involved are 12 U.S.C. 36(c) (National Bank Act) and Section 7–3–6, Utah Code Ann., 1953, as amended. Their pertinent provisions are printed in App. A, *infra,* pp. 44–46.

STATEMENT

The National Bank Act, as amended, 12 U.S.C. 36 (c), permits a national bank, with the approval of the Comptroller of the Currency, to establish new branches (1) in the city, town or village where its main office is located, if State law expressly authorizes State banks to establish branches in their home municipalities (branch offices located in the parent bank's home municipality are known as "inside" branches); and (2) elsewhere in the State if State law expressly authorizes State banks to establish such branches ("outside" branches), "subject to the restrictions as to location imposed by the law of the State on State banks." App. A, *infra,* p. 44. The subsection directly relevant here is (1).

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The law of Utah (Section 7–3–6, Utah Code Ann., 1953; App. A, *infra*, pp. 45–46) authorizes State-chartered banks to establish branch offices within the corporate limits of any city or town in the State. However, except in cities of the "first class" (of which Salt Lake City is the only one), a State bank may establish a new branch only by taking over an existing bank if at least one bank is located there. Only where a city or town has branch banking offices but no principal office of a bank is the "take over" restriction inapplicable. *Walker Bank & Trust Co.* v. *Taylor,* 15 Utah 2d 234, 390 P. 2d 592. The issue presented here is whether the "take over" restriction of Utah law is incorporated in the National Bank Act as a limitation upon the Comptroller's authority to approve the establishment of national-bank branches in Utah.

Facts in No. 51. On or about November 9, 1962, the First National Bank of Logan, Utah, applied to the Comptroller of the Currency for authority, pursuant to 12 U.S.C. 36(c), to establish and operate a branch within the corporate limits of the City of Logan, Utah, where the bank maintains its principal office (Logan R. 12–13). Logan has a population of approximately 20,000. As cities are classified under the law of Utah (Section 10–1–1, Utah Code Ann., 1953), it is a city of the second class (Logan R. 12).

On January 21, 1963, the Comptroller issued a certificate authorizing the establishment of the proposed branch and the national bank began transacting business there. In establishing this branch the national bank did not take over an existing bank (Logan R. 13). Although there were two branches of outside

banks, the national bank was the only bank having its principal office in Logan (Logan R. 3, 13).

At the time, Walker Bank & Trust Company, a banking corporation chartered by the State of Utah, had its principal office in Salt Lake City, Utah (Logan R. 11), and, in addition, approximately fourteen branches throughout the State of Utah (see *Operating Banking Offices Insured by the Federal Deposit Insurance Corporation as of January 1, 1966*), including a branch in Logan (Logan R. 13). Walker Bank had established its branch in Logan by acquiring a State bank in 1956 (Logan R. 12).

On July 9, 1963, Walker brought an action against the Comptroller and the First National Bank of Logan in the United States District Court for the District of Utah for a declaratory judgment that the establishment and operation of the branch were unlawful, and for injunctive relief (Logan R. 1–5). Walker alleged that the national bank in establishing its branch in Logan had not taken over an existing bank, and that such establishment was therefore prohibited by Utah law, made applicable to national banks by 12 U.S.C. 36(c) (Logan R. 4–5).

The case was submitted to the court on stipulated facts (Logan R. 35–36). In a memorandum decision entered on September 30, 1964, the district court first noted, citing *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 390 P. 2d 592, that under Utah law a bank may not open a branch in its home city if it is the only bank having its main office there, since in such a case the law requires that branching be by take-over but by definition there is no other bank to

acquire (Logan R. 39, n. 3).[2] However, the court reasoned, since Utah law expressly authorizes State banks to establish branches in cities and towns anywhere in the State, the conditions of Section 36(c) of the National Bank Act for the establishment of "inside" branches were satisfied and the national banks of the State free to branch (Logan R. 37–45, 234 F. Supp. 74). Judgment was accordingly entered dismissing the complaint (Logan R. 45–46).

The Court of Appeals for the Tenth Circuit reversed (Logan R. 48–56, 352 F. 2d 90), holding that "all the State law an branch banking" and "not just part of it" is incorporated in the National Bank Act and thus applicable to the establishment of branches by national banks (Logan R. 56, 352 F. 2d at 94).

Facts in Nos. 73 and 88. On or about June 25, 1963, First Security Bank of Utah, a national bank, filed an application with the Comptroller for authorization, again pursuant to 12 U.S.C. 36(c)(1), to establish and operate a branch bank within the corporate limits of the city of Ogden, Utah, where the bank maintains its principal office (Saxon R. 23). The bank proposed to establish the branch by opening a new office, rather than by purchasing or otherwise taking over an existing bank. Commercial Security Bank, a Utah banking corporation, has its principal place of business, and one branch, in Ogden; two other

[2] If there were no independent banks at all in Logan, but only branches, any bank could open a branch office there. See p. 4, *supra*. But First National, of course, had its main (and only) office there. Hence the take-over restriction was applicable. *Walker Bank & Trust Co.* v. *Taylor*, *supra*.

banks also have their main offices there (Saxon R. 23). Although more than 140,000 persons reside in the metropolitan area of Ogden, the population of the city itself is approximately 70,000.[3] It is therefore classified under Utah law (Section 10–1–1, Utah Code Ann., 1953) as a city of the second class.

On July 18, 1963, Commercial Security Bank sued the Comptroller of the Currency for declaratory and injunctive relief, alleging that the establishment of the proposed national-bank branch in Ogden was prohibited by Utah's take-over provision, which, it contended, was applicable to national banks by virtue of 12 U.S.C. 36(c) (Saxon R. 5). On June 9, 1964, the Comptroller approved the national bank's application to branch.[4] The national bank then intervened in the suit as a party-defendant.

On December 18, 1964, the district court issued a memorandum opinion holding that all restrictions imposed by State law on branch banking are applicable to national banks (Saxon R. 28–35), and enjoining the Comptroller from authorizing the national bank to open the proposed branch in Ogden (Saxon R. 36). The national bank and the Comptroller appealed. The appeals were consolidated, and the court of appeals, without opinion, affirmed the district court's decision on the authority of the opinion rendered a few days before by the Tenth Circuit in the Logan case.

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[3] Population figures are from the 1960 Census of Population, U.S. Dept. of Commerce, p. 46–14, and the 1961 edition of the Rand McNally Census Book, p. 45.

[4] However, owing to the pendency of Commercial Security's action, no certificate of authority was issued.

ARGUMENT

Introduction and Summary

The National Bank Act permits a national bank (with the approval of the Comptroller of the Currency) to establish and operate new branches within the limits of the city, town, or village where it is located, provided that such establishment and operation are authorized to State banks under the laws of the State in question. 12 U.S.C. 36(c)(1). The State of Utah permits its banks to establish and operate new branches within the limits of their home municipalities (and indeed in cities and towns throughout the State), but only by taking over an existing bank; the opening of a new office is forbidden. The question is whether such a restriction upon branch banking is, by virtue of the provisions of Section 36 (c)(1), applicable to national banks located in Utah. We urge that it is not.

The language and design of the federal statute are inconsistent with the view that such a restriction is among those Congress gave deference in the National Bank Act, and support the view of the Comptroller of the Currency that (apart from capitalization requirements not pertinent here) the only restrictions of State law that are binding upon the Comptroller and the national banks are those prescribing whether and where a State bank may branch—that is, provisions permitting or prohibiting branching and, with respect to branches outside the bank's home municipality, restrictions as to the location of branches. See *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267 (C.A. 4). To read the

statute as incorporating State branch banking law in its entirety—the view of the courts below—would render meaningless the key provisions of the statute, which expressly incorporate some but not all restrictions of State law. However, we do not stop with a consideration of the statutory text. We show that a construction that would subject national banks to restrictions like that at bar cannot in any event be reconciled with the legislative intent.

The issue whether to permit national banks to branch deeply divided the successive Congresses that considered it. Some legislators believed that the national banks should enjoy unlimited branching authority (subject only to approval by the Comptroller of the Currency) without regard to the branch-banking policies of the States, most of which forbade altogether, or strictly limited, branching. Others in Congress, however, were deeply antagonistic to branch banking. They believed that, if national banks were given unrestricted branching power, those States that in their own banking systems had rejected or circumscribed branch banking might be unable to effectuate their policies. The national banks, in their view, might enjoy a competitive advantage so great as to force such a State to choose between relaxation of its policies and impairment of its banking system.

The evils that opponents of branch banking saw were basically threefold: absentee ownership of a community's banking resources; domination of rural banking markets by the more affluent urban banks; and monopolization of a State's banking system by a

few powerful banks having offices throughout the State. These concerns were interrelated and could be summed up in one word: concentration. The opponents of branch banking—like the later sponsors of strict anti-merger legislation applicable to the economy as a whole [5]—feared that a traditional economic order characterized by competition among many independent units, none very large, was threatened; that, given the power to branch, the larger banks would absorb or drive out the smaller, ending the American system of "unit" banking and replacing it with the "central" banking system characteristic of European nations. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 325.

The proponents of branch banking for the national bank system eventually prevailed, but not before making certain concessions to the opponents. The essence of the compromise between the two groups was that the national banks were to be subject to those (but only those) State laws prescribing whether and to what extent State banks could branch. If a State forbade branching altogether, national banks located in the State could not establish branches either. If a State permitted the establishment of branches only within a bank's home municipality, or imposed restrictions upon the location of branches outside the home area, the national banks of the State would also be bound. In this fashion, laws designed to limit the

[5] 64 Stat. 1125 (Celler-Kefauver Anti-Merger Act), amending Section 7 of the Clayton Act, 15 U.S.C. 18. See, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294; Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226.

growth of banks through branching, passed by States that viewed branch banking as dangerously conducive to undue concentration and centralization of banking power, would establish limits for branching by national banks located within the State as well, while in those States where branching was freely permitted, national banks would likewise be free.

Congress did not, however, make all State laws touching the subject of branch banking applicable to national banks. To do so would not have been consistent with the congressional purpose. Congress—whose basic determination was to *increase* the branching powers of the national banks—sought merely to placate opponents of branch banking by deferring to those States which forbade branching or limited its extent—not to adopt the complete body of each State's laws relating to branching. It is demonstrable that many State laws which purport to limit branch banking in fact do no such thing. The provision here in question, for example, in restricting the method of branching to the taking over of existing banks, but not otherwise setting any limits upon branching, actually fosters the very danger—undue concentration—that the opponents of branch banking feared.

Absentee ownership is encouraged, since a bank is free to enter any locality if it can purchase an existing bank, thereby eliminating from the scene the existing owners of the bank (who may be local). Urban domination of rural banking markets is also encouraged, since a bank is free to take over smaller banks in any city or town in the State. And, to the extent that bank branching may foster monopoliza-

tion of the State's banking resources, the Utah provision does so, for no limit is placed on the number of bank outlets that one or a few banks may own. Thus, far from being designed to limit the concentration and centralization of the State's banking industry through branching, Utah's take-over limitation promotes those tendencies.

In attempting an accommodation with the opponents of branch banking, Congress surely did not propose deference to provisions of State law calculated not to avert but to promote the dangers associated (in the minds of opponents) with unrestricted branch banking. To make such provisions bind the Comptroller would distort the purpose of Congress as well as its language. Furthermore, to assume that Congress incorporated such a restriction supposes—we think quite unrealistically—that Congress silently intended to work a fundamental change in its consistent policies toward competition in the banking industry. As in other areas, Congress in the banking field has, in a variety of enactments, ordained a policy (albeit a qualified one) of competition. Utah's take-over limitation, as we demonstrate, is peculiarly anti-competitive in effect, and hence opposed to this policy.[8]

[8] We do not, of course, suggest that all State laws which foster branch banking are necessarily anti-competitive. Branch banking may promote healthy competition by increasing the total number of competing bank outlets in each banking market (see pp. 41–43, *infra*). We urge only that a provision which precludes the establishment of new branch offices, and channels branching exclusively into acquisition of existing banks, is harmful to competition.

A final introductory word is in order. A basic premise of our argument throughout is that Congress, in legislating with respect to branch banking, has paid at least some heed to the views of those who are opposed to the practice. In suggesting that such views are therefore relevant in deciding whether a State branching restriction is applicable to national banks, we have no occasion in this brief to "take sides" in the basic controversy over the desirability *vel non* of branch banking. For, to repeat, the restriction in question here does not express or arise from the State antibranching policies to which Congress, in conferring branching authority upon the national banks, was prepared to defer.

I

THE NATIONAL BANK ACT WAS INTENDED, NOT TO MAKE ALL STATE LAWS RESPECTING BRANCH BANKING BINDING UPON NATIONAL BANKS, BUT TO GIVE EFFECT TO A STATE'S DECISION TO PROHIBIT, OR TO LIMIT THE EXTENT OF, BRANCH BANKING

The National Bank Act authorizes national banks to "establish and operate new branches" within the limits of the city, town or village where the bank is located, "if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question." And in substantially the same language it permits national banks to branch outside their home municipality anywhere in the State, if such branching is affirmatively authorized to State banks by State law, "subject to the restrictions as to location imposed by the laws of the State on State banks" (and subject also to State-law re-

quirements, not in issue here, as to minimum capitalization). 12 U.S.C. 36(c).

The courts below read this language to mean that all of the limitations a State may impose on the establishment of new branches by State banks are equally applicable to the national banks located in the State. By the provision in question here, the State of Utah has authorized its banks to establish and operate new branches within the limits of the cities or towns where they are located—and, indeed, in cities and towns throughout the State—but (with immaterial exceptions) only by taking over existing banks. The courts below hold that this limitation upon the method of establishing a new branch is binding upon the national banks located in Utah, since, in their view, the entire corpus of State law relating to branching is binding upon the national banks within the State. We challenge this conclusion.

In this part of our argument, we address ourselves to the basic issue of what provisions of State law with respect to branch banking may be deemed incorporated in the National Bank Act as limitations upon the branching powers of the national banks in the State. Reviewing the legislative history and background of 12 U.S.C. 36(c), we derive its basic purpose: to defer only to State laws based upon the fear that branch banking leads to an undesirable concentration of a State's banking industry, and which—by prescribing whether and to what extent branching may be engaged in—seek to forbid or circumscribe

the practice accordingly. We suggest below that State branching restrictions, like the Utah provision here, which do not place limits upon the extent of branching but regulate only the method of branching (and that in a way calculated to promote undesirable concentration of the State's banking resources), cannot, consistently with the congressional purpose, be held to bind the national banks. But, preliminarily, we show that the view of the courts below that *all* State restrictions are incorporated in Section 36(c)(1) is, in any event, refuted by the statutory text.

A. THE LANGUAGE AND DESIGN OF THE NATIONAL BANK ACT ARE INCONSISTENT WITH THE VIEW OF THE COURTS BELOW THAT ALL STATE LAW RESTRICTIONS AS TO BRANCH BANKING ARE INCORPORATED IN THE ACT, AND SUPPORT THE COMPTROLLER'S VIEW THAT ONLY STATE LAW PROVISIONS CONCERNING WHETHER AND WHERE BRANCHES MAY BE ESTABLISHED BIND NATIONAL BANKS

1. The National Bank Act provides that the Comptroller may authorize a national bank to establish and operate new branches within its home municipality if such establishment and operation are expressly authorized to State banks by State law. If the State forbids its banks to establish branches within their home municipalities, national banks are likewise foreclosed. But if, as in the case of Utah, the State authorizes State banks to establish branches in their home cities, the language of Section 36(c)(1) strongly suggests that the national banks may establish such branches without regard to additional restrictions that the State may impose upon the manner, rather than the extent, of branching. There is no indication in the statutory text that a State may dictate, not only

whether national banks shall be permitted to branch, but also by what methods or procedures.[7]

Indeed, to read the statute as incorporating all State law restrictions upon branch banking would deny it a rational design. Section 36(c)(2) deals with the establishment by national banks of branches located "at any point within the State" in which the bank is located. In language very similar to Section 36(c)(1), it authorizes the Comptroller of the Currency to approve the establishment and operation of such branches if State banks are similarly authorized. It further provides, however, that the Comptroller shall be "subject to the restrictions as to location imposed by the law of the State on State banks." This provision would be wholly superfluous if the view of the courts below prevailed—for why specify that restrictions as to location are applicable, if the statute makes all State restrictions on branching applicable to national banks? Nor, if their view is sound, was it necessary or appropriate to provide specifically—as Section 36(c)(2) proceeds to do—that a national bank may not establish a branch outside its home municipality unless it meets the capitalization requirements imposed by State law upon State banks. It cannot be presumed that these provisions of the National Bank Act which expressly incorporate specific aspects of State law have no function in the scheme

[7] Where Congress has desired to incorporate all the law of the State relating to a banking question, it has done so expressly. See 12 U.S.C. 36(b): "The Comptroller of the Currency may not grant approval * * * if a state bank * * * would be prohibited * * * from * * * operating * * * an identically situated office * * *." See, also, 12 U.S.C. 85, 92a(a), 371.

of the statute.[8] Plainly, the language and structure of Section 36(c) do not envisage that national banks shall be subject to all of the restrictions on branching imposed by State law. See *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267 (C.A. 4); *Rushton, Attorney General* v. *Michigan National Bank*, 298 Mich. 417, 299 N.W. 129; cf. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 328; *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 413, n. 1.

2. On the contrary, the statutory language and design support the view of the Comptroller that (with the exception of capitalization requirements, not in issue here) the only State law restrictions which bind him are those forbidding branch banking altogether or limiting it geographically.[9] For these are the only restrictions expressly made applicable to the national banks by 12 U.S.C. 36(c).[10] Thus, this Court has de-

[8] "We would not lightly conclude that a Congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 * * *." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 560.

[9] Because 12 U.S.C. 36(c)(1) contains its own geographical restriction (corporate limits of the municipality in which the bank is located) and contains no "restrictions as to location" clause, the Comptroller takes the position that State-law restrictions as to location do not apply to the establishment of inside branches under (c)(1), albeit they apply to outside branches under (c)(2). See *Hoosier State Bank* v. *Saxon*, 248 F. Supp. 233 (N.D. Ind.), appeal pending, C.A. 7, Nos. 15561 and 15562.

[10] Since the national banks are federal instrumentalities, their powers are not limited by State law save as clearly provided by Congress. *E.g.*, *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558–559; *Franklin National Bank* v. *New York*, 347 U.S. 373; *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557.

scribed the State-law branch banking restrictions which are applicable to national banks as "geographical limitations." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 328; *Whitney National Bank* v. *Bank of New Orleans,* 379 U.S. 411, 413, n. 1. And in *First National Bank of Smithfield* v. *Saxon,* 352 F. 2d 267, the Fourth Circuit recently rejected a contention that the Comptroller was required to have "ascertained to his satisfaction * * * that the establishment of such [branch] * * * will meet the needs and promote the convenience of the community" because State law required the State banking commissioner to make such a determination before authorizing establishment of a State bank branch, holding that "the phrase 'restrictions as to location' does not advert to economic factors of need and convenience, but refers exclusively to a geographical determination" (352 F. 2d at 271). Accord: *Rushton, Attorney General* v. *Michigan National Bank,* 298 Mich. 417, 299 N.W. 129.

Under this view, the take-over limitation of Utah law—which is of course not geographical—would not bind the national banks.[11] For purposes of deciding the present case, however, this Court need not adopt in its full breadth the Comptroller's view that he is bound only by State laws as to whether and in what locations branching is permissible. For even assuming that certain State limitations upon branching that do not appear to be strictly geographical may be within the congressional intent in according deference

[11] Respondent Commercial Security Bank suggests (Br. in Opp. 13) that the Utah provision in issue here is a "restriction as to location." This position is different from that of the

to some State-law branching restrictions, the take-over provision of Utah law, we shall demonstrate, is a non-geographical restriction that does *not* embody the kind of State branching policy which Congress, by proposing deference, intended to protect. Under any view, therefore, it is outside the scope of Section 36(c). We begin this branch of our analysis by considering the background and purpose of that section.

B. THE CONCERN OF CONGRESS IN SUBJECTING NATIONAL BANKS TO CERTAIN LIMITED RESTRICTIONS IMPOSED BY THE STATES ON BRANCH BANKING WAS DIRECTED AT THE UNDUE CENTRALIZATION AND CONCENTRATION OF BANKING POWER AND RESOURCES THAT OPPONENTS OF BRANCH BANKING FEARED

1. Prior to the McFadden Act of 1927, 44 Stat. 1224, national banks were not permitted to establish any branch offices. *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640; see Revised Statutes, §§ 5134, 5190. State banks, however, were free to branch where State laws permitted,[12] and the result was to put the national banking system at a sharp competitive disadvantage vis-à-vis State banks. Concern with the impact of State branch banking upon

courts below, which ruled that the Comptroller is bound by "all the State law on branch banking not just a part of it" and that Congress intended that "the measuring stick of national branch banks is state law" (Logan R. 52, 56), and in any event has no merit. Utah authorizes State banks to establish branches in cities and towns anywhere in the State. A State bank was free to establish branches in Logan and Ogden, the cities in issue here, so long as it did so through acquisition. The take-over provision thus imposes no territorial or geographical limitation, and is clearly not a restriction upon the "location" of a bank branch.

[12] In addition, a State bank that converted into a national bank could keep any branches it might have. Revised Statutes, § 5155.

the national banking system led the Comptroller of the Currency, in his 1923 and 1924 annual reports to Congress, to advocate that national banks be given a limited authority to operate through branches. The Comptroller took note, however, of the opposition to branch banking in many parts of the country.[18] It was believed that, in a system which permitted banks to extend their operations through the opening or acquisition of additional offices, the inevitable tendency was an undesirable concentration and centralization of banking resources. Under such a system, it was feared, the industry would become dominated by a few disproportionately large and powerful banks, remote from the people and businessmen of the localities in which they had offices. The Comptroller's proposal—to allow branching only within the limits of the city or town where the bank was located—was designed to allay such fears. The alleged dangers of absentee ownership and control of a community's banking resources, urban domination of rural bank markets, and undue centralization of a State's banking industry would be averted by confining each national bank to its home municipality.

In 1924 and again in 1926, the House Banking and Currency Committee reported out bills to authorize national banks to establish branches in their home municipalities. See H. Rep. No. 583, 68th Cong., 1st Sess.; H. Rep. No. 83, 69th Cong., 1st Sess. These bills contained a further concession to the opponents

[18] Annual Report of the Secretary of the Treasury for 1923, Report of the Comptroller of the Currency, p. 742; *id.* for 1924, pp. 609, 611.

of branch banking: national banks were to be permitted to establish branch offices only in those States that authorized State banks to do so. H. Rep. No. 83, *supra*, p. 4; S. Rep. No. 473, 69th Cong., 1st Sess., p. 8. There was still opposition on the part of antagonists of branch banking (see 67 Cong. Rec. 2829–2860, 3225–3253, 8299), but supporters of the bill could argue persuasively that it was carefully drafted to avoid their apprehensions. Not only would the national banks be foreclosed from establishing branches in States that forbade their own banks to do so; in addition, it was pointed out, the limitation of branching to the cities would protect small communities from absentee ownership of banking facilities, with the loss of personal contact in banking services thereby entailed. So limited, the branching authority conferred by the bill would not produce undue concentration of banking power, since there was ample capital in the cities to assure that there would be enough banks to maintain effective competition. See 67 Cong. Rec. 3240–3241; see, also, *id.*, p. 2832.

As finally enacted, moreover, the McFadden Act forbade national banks to establish branches in cities having a population of less than 25,000. In cities of between 25,000 and 50,000 one branch was to be permitted and in cities of betweeen 50,000 and 100,000 two. 44 Stat. 1224, 1228.[14] Subject to these restrictions, national banks could establish branches in their

[14] This provision was repealed in 1933, 48 Stat. 162, 190, and replaced by federal minimum capitalization requirements, which, as later amended, now appear in 12 U.S.C. 36(d).

home cities "at the discretion of the Comptroller" if home-city branching was authorized to the State banks of the State. S. Rep. No. 473, 69th Cong., 1st Sess., p. 8; 68 Cong. Rec. 5816 (remarks of Congressman McFadden).[15]

In this fashion—deferring to the sensibilities of the individual States on the delicate issue whether branch banking should be allowed by permitting national banks to establish only home-city branches and then only in cities where State banks were permitted to do so—Congress sought to mitigate the "intolerable" disparity in branching powers as between State and national banks that had been created by the national banks' lack of authority to branch (H. Rep. No. 83, 69th Cong., 1st Sess., p. 7), while avoiding most of the dangers thought to stem from branch banking.

Section 36(c)(1) of the National Bank Act, relating to "inside" branches (such as are involved in the present case), is a reenactment of the key branching

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[15] The Senate Committee stated (S. Rep. No. 473, *supra*, at p. 10):

"* * * your Committee is of the opinion that the bill is sufficiently restrictive when it declares unlawful the establishment of branches by national banks in any city in which the State banks are denied that right by State law and properly permissive when it permits national and State member banks to have branches in any city in which it is lawful for State banks to have branches."

The McFadden Act as finally passed also contained a provision limiting the power of State member banks of the Federal Reserve System to retain and operate branches beyond the limits of the city, town or village where the bank's principal office was located.

provision of the McFadden Act (Section 7(c)).[16] But we do not on that account limit our consideration of legislative history to the 1927 Act, for within a few years Congress modified the policies underlying that Act, further enlarging the branching authority of national banks by removing the absolute ban on "outside branches."

2. The growing number of bank insolvencies in the late 1920's, and the panic following the stock market crash of 1929, stimulated a thorough investigation of the entire national and Federal Reserve banking systems by the Senate Banking and Currency Committee, culminating in the Banking Act of 1933 (Glass-Steagall Act), 48 Stat. 162. Among the many banking matters covered by the Act was the problem of branch banking.

The committee believed that bank insolvencies had been a major cause of business distress throughout the country and that "a larger experiment with branch banking" was "essential" to prevent future insolvencies. S. Rep. No. 584, 72d Cong., 1st Sess., p. 11. Accordingly, the committee proposed to authorize national banks to establish branches "not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State

[16] Section 7(c), 44 Stat. 1228, provided:

"A National banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association is situated if such establishment and operation are at the time permitted to State banks by the law of the State in question."

laws." Limited branch banking across State boundary lines was also to be permitted.

This proposal rekindled the same intense controversy over the merits of branch banking that had attended the deliberations leading to the McFadden Act. The author of the bill, Senator Glass, vigorously defended its branch banking provisions.[17] If Statewide branching were permitted, he argued, greater diversity of investment opportunity and greater capitalization would tend to prevent bank failures. A larger banking system would be able to attract and hold competent, skilled personnel. And the provisions permitting branching, he contended, would bring sound banks, with ample credit facilities to many communities lacking adequate banking services.

As for the opposition's contention that his proposal would invade the sovereign rights of the States, he replied, first, that the national government had full authority to regulate the national bank system and that the National Bank Act itself had once imposed a

[17] 75 Cong. Rec. 9890–9899. Noting that 90 percent of the bank failures between 1921 to 1931 had occurred in towns of fewer than 25,000 people, he asserted that the problem was largely one of rural bank failures (75 Cong. Rec. 9892). Economic changes, and particularly the centralization and concentration of industry and commerce, he argued, had curtailed the opportunities for small country banks. Lack of opportunity for diversified investments and under-capitalization had weakened country banks but broadened the opportunities for large metropolitan banks. Weak country banks could not attract expert bank managers and skillful officials, were unable to meet the needs of their communities, and were prime candidates for failures (*id.*, pp. 9896-9897).

prohibitory tax upon State banks which had been sustained by the Supreme Court as constitutional,[18] and, second, that any competitive advantage in regard to branching given national banks by his bill could, and probably would, be remedied by the States' authorizing State-wide branch banking to State banks. Lastly, he noted that there were no compulsory provisions in the bill, and that a national bank would not establish a branch in a community unless it believed that the community needed and desired it.

The opponents of the branching provisions of the Glass bill raised numerous arguments against them. For example, Senator Norbeck, the Chairman of the committee, filed a minority report "in protest against the proposed extension of branch banking." S. Rep. No. 584, *supra,* Part II. He opposed the branch banking provisions primarily on the grounds that they would foster undue centralization of banking power and lead to a nationwide system of branch banking. *Id.,* pp. 3, 4–6. He made reference to the "great desire on the part of certain people to wipe out the State banking system," and to a movement "to control the banking industry of the United States by centralization" which "might be termed not only national but international" and which would accomplish its ends "through nationwide branch banking and the complete elimination of the unit bank." *Id.,* pp. 1, 3.

[18] See *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U.S. 29, 33–34.

Opposition on the floor of the Senate to the branching provisions of the Glass bill was intense[19] and prolonged. It was maintained that to permit State-wide branching by national banks would as a matter of competitive necessity force branch banking upon the States—that or cause the demise of the State banking systems—even though all but 10 or 12 States forbade

[19] See, *e.g.*, remarks of Senator Bratton (76 Cong. Rec. 1449–1450):

"I believe that one of the major contributing causes to the difficulty in which we find ourselves is the accumulation, the concentration of too much wealth in too few hands. It is not a sudden condition; it is not one consequent upon developments in the last few months or the last few years. It is a crystallization of a definite movement covering many years, resulting in the accumulation of too much wealth in too few hands.

"Indeed, Mr. President, we have reached a condition where a half dozen Americans could, whether through fear or otherwise, close their purse strings and involve the whole country in a panic. That is not a wholesome condition. We should undertake to stem the tide. We should endeavor to minimize it. But instead of doing that, it is proposed now that we authorize the national-bank system of the country to take a step farther than we have ever gone before. We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not.

"Mr. President, it is easily conceivable that if we go that far, in the course of 10 years or less three or four powerful banking institutions may control the banking system of the country. If the fear I entertain is well founded, the extent of the evil consequences cannot be overstated. If in the system lurks the danger I apprehend, its effect upon the country cannot be exaggerated too greatly. Are we willing that three or four powerful organizations, three or four powerful groups of men, three or four powerful groups of money may control the banking facilities of the country? If so, the enactment of [the branch banking provisions of] the bill will contribute to that end."

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State-wide branching to their banks. See 75 Cong. Rec. 9890, 10055, 13002; 76 Cong. Rec. 1449, 1997, 2079, 2090, 2205, 2206. The dangers if branch banking were permitted to take hold throughout the nation were portrayed by opponents in the same terms as in the debates on the McFadden Act. Once again, the view was expressed that unlimited branch banking led to the domination of the banking industry by a few large banks, to the detriment of small independent banks; fostered absentee ownership of banking facilities, and thereby harmed businessmen forced to deal with banks having no roots in their communities; and contributed to the domination of rural areas, where capital was scarce, by the large cities where banking resources were much greater. Once again, predictions that undue concentration and centralization of banking would result from State-wide branch banking were vigorously advanced as reasons against relaxing the stringent limitations on the branching authority of the national banks. See 75 Cong. Rec. 9973–9982; 76 Cong. Rec. 1333, 2074, 2075, 2146.

Opponents of the bill launched a filibuster, and, after a cloture motion was defeated by a margin of one vote (see 76 Cong. Rec. 1935, 2077), the sponsors of the bill were prepared to compromise. An amendment was proposed, and accepted, permitting State-wide branching by national banks only in States that authorized their own banks to establish such branches, and then "under restrictions as to location imposed by the law of the State on State banks." 76 Cong. Rec. 2079, 2205, 2208. When the location clause was accepted, another proposed amendment, which would

have forbidden branching save by taking over existing banks (76 Cong. Rec. 2080), was withdrawn by its sponsor as inappropriate in light of the location amendment. 76 Cong. Rec. 2208. Having made these concessions, the proponents of branch banking for the national bank system again prevailed.

As Senator Glass, in reporting the bill that was finally enacted, summed up (77 Cong. Rec. 3726):

> * * * We here legislate for a national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand.* * *

And a member of the conference committee explained (77 Cong. Rec. 5896):

> In the controversy over the respective merits of what are known as "unit banking" and "branch banking systems," a controversy that has been alive and sharp for years, branch banking has been steadily gaining in favor. It is not, however, here proposed to give the advocates of branch banking any advantage. We do not go an inch beyond saying that the two ideas shall compete on equal terms and only where the States make the competition possible by letting their own institutions have branches. In short, we say only that if a State invites the race, let the better horse win. The system which proves itself the better able to serve the people will in the end prevail.[30]

[30] In 1952 Congress adopted the only major amendment to Section 36(c)(2), making State law requirements as to minimum capitalization of branches applicable to branches of na-

C. A STATE RESTRICTION UPON BRANCHING THAT IS UNRELATED TO CONCERN WITH THE DANGERS OF CONCENTRATION OF BANKING POWER WHICH OPPONENTS BELIEVED INHERENT IN BRANCH BANKING IS NOT INCORPORATED IN THE NATIONAL BANK ACT

The foregoing review of the decade of legislation consideration that preceded enactment of the branching provisions of the National Bank Act in essentially their present form offers considerable guidance in deciding which of the many and diverse restrictions of State law on branching [21] apply to national banks. As finally enacted, the branching provision of the National Bank Act represented a compromise between those who discounted the dangers of branch banking and believed it sound policy to give national banks very broad authority to establish branches, and those who believed that branch banking was undesirable because it promoted (in their view) the concentration of banking power and resources. The essence of the compromise was to defer to State policy in the matter only to the extent necessary to assure that the policies of the anti-branching States would not be undermined.

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tional banks to be located outside their home municipality. Act of July 15, 1952, c. 753, § 2b, 66 Stat. 633. Under the 1933 provisions, in order to establish a branch outside its home city, a national bank was required to have a capital stock of at least $500,000 (with a lesser minimum for States of less than 1 million population); the same requirement was applicable to State banks which were members of the Federal Reserve System. Congress believed the requirement unduly burdensome and removed it, but determined that national banks should be required to meet such minimum capitalization requirements as State law might impose on the establishment of outside branches by State banks. See H. Rep. No. 2423, 82d Cong., 2d Sess., p. 3. See, also, S. Rep. No. 1623, 82d Cong., 2d Sess., p. 3.

[21] We have set forth in App. B, *infra*, pp. 47–52, a summary of the pertinent provisions of the laws of the fifty States on this subject.

If, therefore, a State branching restriction is grounded in concern with the alleged dangers of unlimited branch banking, and designed to avert these dangers by limiting the extent of branching, an argument can be made that it should control branching by the national as well as State banks of the State in question even if the restriction is not among those expressly enumerated in Section 36(c), since it reflects the kind of policy determination that Congress, as the price of enlarging the branching authority of the national banks, agreed to honor. On the other hand, if an ostensible limitation upon banching reflects a different policy, unrelated to concern with the supposed dangers of branch banking, there is no basis whatsoever for assuming that Congress meant to defer to it.

A pair of examples will illustrate. Suppose that a State which subscribes to the view that unlimited branch banking tends dangerously toward concentration decides, nonetheless, that a complete prohibition upon branching would be impractical, and that the conditions of modern finance require a more flexible approach. And suppose that to this end a State authorizes each of its banks to open one, and only one, branch office.[22] The language of Section 36(c) suggests that in these circumstances there would be no operative State limitations upon national banks. On the other hand, it may be argued that a construction that would compel the States to adopt extreme positions regarding the branch banking question—that

[22] The example is hypothetical; no State today has such a limitation.

recognizes no middle ground between a policy of total opposition and one of complete toleration—is not easily reconciled with the purposes of Congress (to which it might be answered, however, that Congress *has* afforded a sufficient middle ground by subjecting national banks to State-law restrictions upon the location of branches).

Let us put a somewhat different case. Suppose a State provides that any bank can establish branches throughout the State if its charter is at least fifty years old. Such a restriction, we submit, cannot be deemed applicable to the national banks of the State. It is designed not to limit the extent of branch banking, but to give a particular class of banks a monopoly of branch banking. It is thus not only outside the statutory language, but also quite irrelevant to the concerns to which Congress was prepared to give deference.[23]

For purposes of deciding the present case, this Court need not resolve the question whether Section 36(c) may be read broadly to achieve results which, while difficult to reconcile with the literal terms of the statute, accord with the policies that underlie it. For, as next we show, the Utah take-over restriction here in issue is incompatible with those policies. Un-

[23] Similarly, State laws that require that the establishment of a branch not adversely affect the profits of existing banks are designed, not to limit the extent of branching, but to limit competition and to protect the profits of existing banks. They, too, are irrelevant to the concerns to which Congress was prepared to give deference.

like a limitation (our first example) upon the number of branches a bank may establish, the Utah restriction is calculated to aggravate the very evils that the opponents of branch banking apprehended when they insisted that Congress defer to the policies of the anti-branching States.

II

THE TAKE-OVER LIMITATION OF THE STATE OF UTAH IS NOT DESIGNED TO LIMIT THE EXTENT OF BRANCH BANKING IN THE SENSE CONTEMPLATED BY CONGRESS IN 12 U.S.C. 36(c); IT IS THEREFORE INAPPLICABLE TO NATIONAL BANKS

The State of Utah has determined that the banks it charters may open new branches, without any limit as to number, in cities and towns anywhere in the State. However, it has provided that a branch may be established only by taking over an existing bank and not by opening new branch offices.[24] The question, of course, is whether this restriction is applicable to the national banks of Utah.

Congress, as noted, has recognized that a particular State might believe that branch banking fosters absentee ownership, urban domination of rural areas, and monopolization of the State's banking industry and has decided to defer if the State, in order to avert such consequences, sets limits upon the extent of branch banking. Where these limits are expressed in the form of a geographical or locational restriction upon the branching powers of State banks, the na-

[24] The take-over limitation does not apply in Salt Lake City and its county. We shall disregard this exception (which is not relevant here) in the following discussion.

tional banks are clearly bound. And it is strongly arguable that such restrictions are the only ones that bind the national banks, not only because the language of the National Bank Act so indicates, but also because by imposing appropriate geographical restrictions a State should be able wholly to avert the three dangers—absentee ownership, urban domination of rural banking markets, and monopolization of a State's banking industry—that unlimited branch banking is said to promote. Additional restrictions need not be implied to permit a State to steer a flexible middle course between complete prohibition and complete permission of branch banking without placing its banks at a competitive disadvantage vis-à-vis the national banks of the State.

In any event, however, it is clear—as we shall now endeavor to demonstrate—that Utah's take-over limitation embodies none of the State policies to which Congress sought to defer in incorporating some State-law restrictions in the National Bank Act. Accordingly, under no proper view of the statute can it be deemed included among those restrictions.[25]

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[25] We pause here to note that none of the decisions cited by respondents (with the exception of the two under review here) support their position. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F. 2d 537 (C.A. 6), certiorari denied, 358 U.S. 830, dealt with whether a State statute that imposed territorial limitations upon branching and provided that within these limits a branch could be established only in a city or village in which no State or national bank (or branch thereof) was in operation bound the Comptroller. The court held that the provision was a location restriction within 12 U.S.C. 36(c)(2). Utah's take-over limitation has no territorial dimension; in addition, the question whether it binds the Comptroller arises in the context of a national bank's application to open an

1. Utah looks with apparent equanimity upon the prospect that the banking business of particular localities within the State will come to be wholly dominated by banks located elsewhere. Suppose that town X

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inside branch, and 36(c)(1), which regulates inside branches, has no counterpart to the location clause of (c)(2). In *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842 (D. S.Dak.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970, the court held that a regulation of the State Bank Commission fixing a territorial limitation upon branching was inapplicable to the national banks of the State. Other decisions involving the location clause, and clearly inapposite here, are *Community National Bank of Pontiac* v. *Saxon*, 310 F. 2d 224 (C.A. 6); *Commercial State Bank of Roseville* v. *Gidney*, 174 F. Supp. 770 (D. D.C.), affirmed *per curiam*, 278 F. 2d 871 (C.A. D.C.); and *Union Savings Bank of Patchogue* v. *Saxon*, 335 F. 2d 718 (C.A. D.C.). *Jackson* v. *First National Bank of Valdosta*, 349 F. 2d 71 (C.A. 5), held only that where State law prohibits a bank from having more than one additional "bank office" or "bank facility" in the same city, the State Superintendent of Banks has standing to raise the question whether a national bank's drive-in facility is a "bank office" or "bank facility." To be sure, the court's opinion in that case contains some broad language to the effect that Congress in Section 36(c) established a "policy of equalization" in branching powers as between State and national banks. This phrase was taken from this Court's opinion in *Lewis* v. *Fidelity and Deposit Company*, 292 U.S. 558, 565, where the Court was dealing, not with branch banking, but with the provisions of the Act of June 25, 1930, 46 Stat. 809, which authorized national banks to give security for the deposit of public moneys "of the same kind" as was authorized by the law of the State for State banks. This Court interpreted that statute as placing national and State banks on a parity as to the security which could be given. This does not show that the different language in the branch banking statute brought about a similar parity in branching. True, the Court, in giving examples of such a "policy of equalization," mentioned the branch banking statute, but it never suggested that in that instance a complete equivalence of State and national bank powers had been ordained by Congress.

has four independent banks. There is nothing in the banking laws of Utah that would prevent the banks of Salt Lake City from obtaining control over the entire banking industry of X by acquiring all of the independent banks located there and operating them as branch offices. Indeed, any Utah State bank that desires to expand into another locality can do so only by absorbing an independent bank and thereby eliminating local control of that bank. Thus, the peculiar structure of Utah's branch-banking provisions—which permit unlimited branching but decree that it shall be only by acquisition of existing banks—actually fosters absentee ownership. Banks are encouraged to grow beyond their home-office area but prevented from doing so other than by displacing an existing bank.

2. A traditional fear of opponents of branch banking is that the wealthier and more heavily capitalized urban areas of a State might come to dominate the banking markets of the rural areas and thereby impair the independence of local businessmen who are dependent upon bank credit. The branch banking provisions of Utah are not designed to prevent such a result, but, indeed, encourage it. As noted, no restriction is placed upon branching as such. Therefore, wealthy city banks are free to branch in the small towns located in the rural areas of the State. But they may not open any new facilities. They may only take over—and so eliminate as independent factors—existing banks. This system is plainly calculated to accelerate the growth of large urban banks at the expense of rural banks.

3. By the same token, the branching pattern prescribed by Utah law is inimical to the continued existence of an independent, unit banking system. Virtually no limit is placed upon the growth and expansion of powerful banks. No statutory provision precludes a single bank from coming to dominate the entire State banking industry. Certainly, none precludes growing concentration of the State's banking industry in the hands of an increasingly small number of powerful, geographically diversified banks—like the Walker Bank involved in No. 51, a Salt Lake City bank (chartered by the State) that has 14 branches throughout the State.

The take-over limitation aggravates this tendency. By precluding branching through the opening of new branch offices, it prevents a form of expansion that might be compatible with the continued existence of a substantial number of independent banks. If a bank establishes a branch by opening a new facility rather than by absorbing an existing bank, it must win a share of the banking market as a newcomer competing against the established banks in the locality, it does not merely step into the shoes of an existing competitor. This route of expansion is closed to the State banks of Utah. The only permissible mode of entry into new banking markets for them is by acquisition of existing banks, which means that every increase in branch banking in the State necessarily produces an equivalent decline in the number of independent banks in the State.

There is another respect in which Utah's take-over limitation promotes the concentration of banking assets. Suppose that a city has only one bank—a situation normally regarded as undesirable. To break its monopoly the State banking commissioner or the Comptroller of the Currency could, of course, charter a new bank in the area. But such are the practical problems involved in creating a new bank that, in many cases, the only feasible method of increasing competition in a one-bank (or other highly concentrated) banking market is to permit the establishment of a branch by an existing bank located elsewhere.[26] Utah law forbids this. In a town that has only one bank, another bank may enter only by taking over that bank—a result that leaves the condition of monopoly undisturbed.

The restriction in question here, in short, is not one designed to avert or contain the danger with which the congressional opponents of branch banking were concerned. For it is a restriction aimed not at limiting the extent of branch banking, but, if anything, at promoting its spread; a restriction rooted, not in a fear of the supposed consequences of unlimited branch banking, but in a desire to immunize existing banks—branch banks as well as the smallest independent—from the competition that is created when a new bank

[26] "* * * [S]ince branches appear to cost less to operate than small unit banks, and consequently require less capital and fewer deposits for profitable operation, branch establishment is possible in less populous or more heavily banked areas where unit bank charter would be precluded." Note, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 Yale L.J. 502, 514–515.

office is opened in a locality.[27] The tendency of Utah law is to bring about the domination of the State's banking industry by powerful branch banks effectively insulated from competitive forays by each other or by other banks. Nothing in the language, background or purpose of Section 36(c) indicates that Congress intended this kind of State policy determination to be binding on the national banks. It would be ironic to hold that, because Congress desired to give some play to strongly held feelings in many States concerning the dangers of undue concentration posed by unlimited branch banking, a provision of State law that bespeaks the State's apparent indifference to these dangers governs the national banks in the State as well.

Nor would such a result be consistent with Congress' declared purpose of establishing national banks upon a plane of competitive equality with State banks. If Utah has no policy against banks with many branches, it is not apparent why the national banks of the State should be prevented from branching because of an extraneous restriction of State law upon the method of branching. The thrust of Section 36(c) is to free national banks from restrictions upon their authority to branch, and while Congress did decide to limit that authority in States that prevent or limit the extent of branch banking within their own banking systems, it surely did not intend that in States, like

[27] See *Walker Bank & Trust Co.* v. *Taylor*, 15 Utah 2d 234, 237, 390 P. 2d 592, 594. Compare the provision of Utah Code Ann., 1953, § 7–3–6, not in issue here, forbidding establishment of a branch "at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof."

Utah, in which State-wide branching is encouraged, branching by national banks should be frustrated by provisions of State law.

III

AT ALL EVENTS, CONGRESS CANNOT BE PRESUMED TO HAVE IMPOSED UPON THE NATIONAL BANKS A LIMITATION OF STATE LAW, LIKE THAT AT BAR, WHICH IS OPPOSED TO A CONSISTENT FEDERAL POLICY OF PROMOTING COMPETITION IN BANKING

Quite independently of the argument set forth immediately above, we submit that in no event should the language of Section 36(c) be read so broadly as to embrace a provision of State law that is manifestly contrary to consistent federal policy in the banking area. In this part of our brief, we urge that (a) there is a well-defined federal policy favoring competition in banking and (b) that Utah's takeover provision is incompatible with that policy.

A. Since the enactment of the Sherman Act in 1890, competition has been the nation's fundamental economic policy. See (with reference to the banking industry) *United States* v. *Philadelphia National Bank*, 374 U.S. 321; *Transamerica Corp.* v. *Board of Governors*, 206 F. 2d 163 (C.A. 3); 15 U.S.C. 21(a). The banking agencies—unlike the agencies that regulate transportation and communications—have no power to confer antitrust immunity. The Bank Merger Act, as recently amended, prohibits bank mergers "whose effect in any section of the country may be substantially to lessen competition" unless its adverse competitive effects are "clearly outweighed" by considerations of public need and convenience. Pub. L. 89–356, February 21, 1966, § 1, adding 12 U.S.C.

1828(c)(5), (7). "[P]romotion of healthy competition among financial institutions" was a "primary concern" in amending the Act. H. Rep. No. 1221, 89th Cong., 2d Sess., p. 2. And the Bank Holding Company Act of 1956 was in large part intended to preserve "competition in the field of banking" and prevent undue concentration of banking power. 12 U.S.C. 1842(c); S. Rep. No. 1095, 84th Cong., 1st Sess., Part I, p. 2; 102 Cong. Rec. 6857. See, also, *First Wisconsin Bankshares Corp.* v. *Board of Governors,* 325 F. 2d 946 (C.A. 7).

B. Utah's take-over provision is inimical to this consistent federal policy favoring competition in banking in two respects. First, it encourages bank mergers—that being the only method by which a State bank of Utah may branch—even between competing banks located in the same town or village. Not all such mergers are substantially anti-competitive, but this Court has pointed out the serious competitive dangers that some create (*United States* v. *Philadelphia National Bank,* 374 U.S. 321, 369–370):

> * * * Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. * * * If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish. At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally.

Secondly, Utah's take-over restriction is anti-competitive in that it precludes new entry into highly concentrated banking markets through internal expansion. Viewed from the standpoint of the federal policy of fostering competition, the opening of new bank offices is often preferable to the acquisition of existing banks as a method of growth. *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 370. Entry by internal growth increases the number of banks in the market, while entry by merger—which merely substitutes the new entrant for an existing competitor—leaves concentration in the market unchanged. Cf. *United States* v. *Penn-Olin Chemical Co.,* 378 U.S. 158, 174.

It is no answer that limiting branching to the acquisition of existing banks encourages the formation of new banks and so indirectly retards concentration (Br. in Opp., No. 88, p. 15). Entry into a market by forming a new bank is substantially more difficult, and usually less feasible, than the establishment of a branch by an existing institution (see n. 26, *supra,* p. 37). Formation of a new bank requires the raising of substantial sums of new capital from individual subscribers, the recruitment of new management, and a period of investigation into the character and competence of the new management by the appropriate banking authority. Moreover, its successful operation will probably depend upon a protracted effort to secure the confidence of customers. In banking, even more than in other industries, creation of new independent units of competition is a costly, difficult, uncertain, and time-consuming process. By contrast, a branch bank may frequently be established with the

parent bank's existing capital and managerial personnel, and securing customers in a new area is facilitated by the bank's name and reputation in the communities it already serves.

In any event, there is no indication that the Utah statute in fact encourages the formation of new unit banks. It seems more likely to do the opposite. Since the large city banks are free to establish branches in cities and towns throughout the State, a newly formed bank may have to meet, from the outset, competition from the largest, most powerful banks in the State—banks whose loan limits, capital resources, and diversity of investments no new bank could hope to match. If, for example, the Utah statute were applicable to national banks, there would be little incentive for the formation of a new bank in Logan, since any new bank would have to meet the competition of Walker Bank & Trust Co.—the second largest bank in the State.

If, as we urge, Utah's requirement that a branch may be established only by taking over an existing bank is limited to State banks, the national banks of Utah will remain an important source of new competition in concentrated banking markets in the State. If, however, the restriction is applicable to national banks as well, the adverse competitive effects of the State's restrictive policy will be greatly aggravated, and the Comptroller placed in the untenable position, in passing upon requests for approval to branch, of having to choose between permitting a merger—which in many cases will increase concentration, and rarely lessen it—and forbidding the establishment of a branch

altogether—which may deny the market involved a needed competitive infusion.

We think it unsound to presume, in the absence of express statutory language, that Congress intended a restriction so contrary to long-established federal policy to bind the Comptroller and the national banks. Such a result, as noted previously, has no support in either the text or the history of the branch banking provisions of the National Bank Act. Congress intended deference only to certain State laws that sought to check concentration which opponents feared might result from branch banking—not, as in the case of Utah, laws designed to achieve an antithetical result.[28]

CONCLUSION

The judgments below should be reversed.

Respectfully submitted.

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[28] The anti-competitive character of Utah's branching laws is suggested by the fact that Utah has far fewer banks per capita than the national average. See App. C, *infra*, p. 53.

APPENDIX A

United States Code, Title 12, Sec. 36(c) provides:

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided,* That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in

which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

Utah Code Annoated, 1953, Sec. 7–3–6, as amended, provides:

7–3–6. Business conducted at banking house—Branching of offices—Violation of section a misdemeanor.—The business of every bank shall be conducted only at its banking house and every bank shall receive deposits and pay checks only at its banking house except as hereinafter provided.

With the consent of the bank commissioner any bank having a paid-in capital and surplus of not less than $600,000 may establish and operate one branch for the transaction of its business; provided, that for each additional branch established there shall be paid in an additional $60,000 (capital and surplus).

All banking houses and branches shall be located either within the corporate limits of a city or town, or within unincorporated areas of a county in which a city of the first class is located.

Except in cities of the first class, or within unincorporated areas of a county in which a city of the first class is located, no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business, unless the bank seeking to establish such branch shall take over an existing bank. No unit bank organized and operating at a point where there are other operating banks, state or

national, shall be permitted to be acquired by another bank for the purpose of establishing a branch until such bank shall have been in operation as such for a period of five years.

The term "branch" as used in this act shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received or checks paid or money lent.

Any bank desiring to establish one or more branches or offices shall file a written application therefor in such form and containing such information as the bank commissioner may resonably require. No bank shall be permitted to establish any branch or office until it shall first have been shown to the satisfaction of the bank commissioner that the public convenience and advantage will be subserved and promoted by the establishment of such branch or office. The bank commissioner may, at his discretion, hold a public hearing on any application to establish a branch. He shall give notice of such hearing by publication in three successive issues in a newspaper of general circulation in the county in which the branch is to be established. The decision of the bank commissioner granting or denying an application to establish a branch shall be in writing, state the reasons therefor, and shall be mailed to the applicant and all protestants. The bank commissioner may by order permitting the establishment of such branch or office designate and limit the character of work and service which may therein be performed.

No branch shall be established at a location outside the corporate limits of a city or town in such close proximity to an established bank or branch as to unreasonably interfere with the business thereof.

Any corporation or officer thereof violating any of the provisions of this section is guilty of a misdemeanor.

APPENDIX B

Summary of the Branch Banking Statutes of the Fifty States

(1) States permitting branching without restriction as to location or method:

Alaska—Alaska Stats. 1962, Title 6, § 06.05.-415.

Arizona—Ariz. Rev. Stat. Anno., Title 6, § 6–223.

California—Calif. Financial Code, §§ 502, 503, 361.

Delaware—Dela. Code Anno., Title 5, § 770.

Hawaii—Hawaii Session Laws 1956, Vol. I, Act 201, § 43, amending § 178–39, Revised Laws of Hawaii.

Idaho—Idaho Code, § 26–1001 (1965 Supp.).

Maryland—Anno. Code of Md., Art. 11 § 65.

Nevada—Nevada Rev. Stat., § 660.010.

North Carolina—Gen. Stats. of N.C., § 53–62 (1965).

Rhode Island—Gen. Laws of Rhode Island, § 19–1–13.

South Carolina—Code of Laws of S.C., § 8–57.

Vermont—Vermont Stats. Anno., Title 8, §§ 501 *et seq.*

(2) States which permit branching but impose geographical restrictions:

Alabama—Code of Ala. (1958), Title 5, §§ 125, 125(1); Appendix, §§ 192, 193, 429, 555, 986; Acts of Alabama, 1965 and 1964 1st and 2d Special Sessions, Acts 22, 24, 40, 60, 70, 91, 152, 184; Acts of Ala. Regular Session 1965, Act 510; and Acts of Ala., Regular Session of

1964, Acts 332, 521, and 884 (although Code generally prohibits branches except at principal place of business, special acts permit county-wide branching in most instances and home-city branching in others).

Georgia—Code of Ga. Anno., § 13–203 (home municipality branching only; but in towns of 80,000 people or less, only one bank office or facility for each 40,000 persons).

Indiana—5 Burns Ind. Stats. Anno., (1964 replacement), § 18–1707 (home municipality branching for counties with less than 500,000, except that a bank may establish branch in any city or town within county if there is no bank there; for counties of more than 500,000 people, branching in any city or town in the county; no branch within ¼ mile of another bank nor at any location which will jeopardize the welfare of another bank.)

Kentucky—Ky. Rev. Stat., § 287.180, as amended by Chap. 252, Ky. Acts 1962 (home-county branching, except that branching permitted in adjacent county in which there is no existing bank or branch; in addition, except by merger, no branch may be established in any incorporated city, except the home city in which there is an existing bank, and no branch in any unincorporated area within a radius of one mile of an existing bank).

Louisiana—Louisiana Rev. Stats. Anno., §§ 6–54, 6–55 (branches in the parish of domicile only, except in four specified parishes, or in parishes which have no banks).

Maine—Rev. Stats. of Maine Anno., 1964, Title 9, §§ 442, 443 (home county or adjacent counties; but branch may be established in any municipality by taking over a unit bank or where there is no bank).

Massachusetts—Anno. Laws of Mass., Chap. 172A, § 12, and (1965 Cum. Supp.) Chap. 172, § 11 (home county branching).

Michigan—Mich. Stats. Anno., § 23.762, and 1965 Cum. Supp.), § 23.762(1) (branching with-

in home county, or within 25 miles of principal office; but no branch may be established in a city or village outside the home municipality, if a bank or branch is already located there).

Mississippi—Miss. Code Anno., §§ 5228, 5229, 5230, 5231 (home county or adjacent county; but branches must be within a radius of 100 miles of the parent bank and no bank can establish more than 15 branches).

New Hampshire—N.H. Rev. Stat. Anno., § 384B; 2 (1965 Supp.) (branches within home municipality; branch may be established in any town by consolidation or merger or unless no bank or branch in contiguous town).

New Jersey—N.J. Stats. Anno., § 17: 9A–19 (home municipality; by merger, home county).

New Mexico—N.M. Stats. Anno., § 48–2–17 (home county, except where adjacent county has no bank).

New York—McKinney's Consolidated Laws of N.Y. Anno., Title 4, §§ 105, 600, 601a (any city or village in the same banking district, with exceptions).

Ohio—Page's Ohio Rev. Code Anno., Title 11, § 1103.09 (home county).

Pennsylvania—Purdon's Pa. Stats. Anno., Title 7 (Banking Code of 1965) § 904 (home county, plus contiguous counties).

South Dakota—S.D. Code of 1939, § 6.0402 (no branch in any city or town after a bank has received authority to operate there, with exceptions for branching by consolidation or purchase).

Tennessee—Tenn. Code Anno., § 45–211 (home county).

(3) States which permit branching, but which require and/or encourage that it be accomplished by acquisition or merger rather than by the establishment of new facilities:

Connecticut—General Stats. of Conn. (1958), Title 36, § 36–59 (State-wide branching by

merger permitted, but establishment of branches by new facility limited to home town or to towns where there are no banks).

Kentucky—Ky. Rev. Stat., § 287.180, as amended by Chap. 252, Ky. Acts 1962 (county-wide branching permitted by merger; but, except by merger, no bank may establish a branch outside its home city, unless there is no bank there).

Maine—Rev. Stats. of Maine Anno., 1964, Title 9, §§ 442, 443 (branches may be established in any municipality in the state by taking over a unit bank or where there is no bank; otherwise, only in home county or adjoining counties).

Massachusetts—Anno. Laws of Mass., Chap. 172A, § 12, and (1965 Cum. Supp.), Chap. 172, § 11 (if branching by merger, no need to show that present banking facilities are inadequate for the public convenience).

Mississippi—Miss. Code Anno., §§ 5228, 5229, 5230, 5231 (branch may be established by acquisition where within 100 miles of parent branch; otherwise restricted to home county and adjacent counties).

New Hampshire—N.H. Rev. Stat. Anno., § 384B; 2 (1965 Supp.) (branch may be established by acquisition within 30 miles of main office; but otherwise restricted to home town or to places where there are no banks).

New Jersey—N.J. Stats. Anno., § 17:9A–19 (home municipality; by merger, home county).

New York—McKinney's Consolidated Laws of N.Y. Anno., Title 4, §§ 105, 600, 601 (branching by merger permitted in some instances where otherwise prohibited).

Oregon—Ore. Rev. Stat., § 714.050 (in municipality of less than 50,000 where there is an existing bank, branching permitted only by taking over an existing bank).

Pennsylvania—Purdon's Pa. Stats. Anno., Title 7 (Banking Code of 1965), § 904 (if branching by merger, no need to show needs and convenience).

South Dakota—S.D. Code of 1939, § 6.0402 (no branch in any city or town after a bank has received authority to operate there, with exceptions for branching by consolidation or purchase).

Utah—Utah Code Anno. (1953), § 7–3–6 (as set forth, *supra,* pp. 45–46).

Virginia—Code of Va., Title 6, § 26, and § 6–27 (State-wide branching by merger; otherwise branching is limited to home city or to cities and counties contiguous to the city or county in which the parent bank is located).

Washington—Rev. Code of Wash. Anno., § 30.40.020 (State-wide branching by merger permitted; otherwise branching restricted to the home county, or to those that have no bank or branch).

(4) States that prohibit branches as such but authorize branching facilities:

Arkansas—Ark. Stats. 1947, 1966 replacement, §§ 67–205, 67–340, 67–341, 67–342, 67–345, 67–348 (branching permitted in a town of not more than 4,000 or less than 3,900 people; authorized banks may establish teller's windows in their home cities, no closer than 3,000 feet to the main office of any other bank; except that any bank chartered for 60 years or more may establish a teller's window in any town or city of the second class within the home county if there is no other legally chartered bank or window there).

Florida—Fla. Stats. Anno., § 659.06 (drive-in or walk-up facility permitted if it is located on the property of the main bank or on property contiguous thereto).

Iowa—Iowa Code Anno. (1965 Cum. Supp.), § 528.51 (office for receiving deposits and paying checks permitted in place contiguous to the county in which the bank is located; but not in cities or towns where there is already established a banking institution; parking lot offices with drive-in windows for receiving and paying of checks also permitted).

Kansas—Kan. Stats. Anno., § 9–1111 (one detached or attached auxiliary teller office or drive-in facility within 2,600 feet of premises).

Missouri—Vernon's Anno. Mo. Stats. (1965 Cum. Supp.), § 362.107 (one drive-in or walk-up facility per bank within 1,000 yards of the bank permitted).

Montana—Rev. Codes of Mont. Anno. (1965 Cum. Supp.), § 5–1028 (one detached drive-in or walk-up facility within 1,000 feet of bank).

Nebraska—Rev. Stats. of Neb. (1965 Cum. Supp.) § 8–157 (one auxiliary teller drive-in or walk-up facility within 2,600 feet of main bank).

North Dakota—N.D. Century Code (1965 Supp.), § 6–03–14 (receiving and paying stations within home county or adjoining county, or in city, town or village not having a bank).

Oklahoma—Okla. Stats. Anno. (1965 Supp., Title 6, § 2061 (one outside facility for drive-in or walk-up service within 1,000 feet of bank).

(5) States which do not permit branch banks or other branching facilities, but permit branching for saving and loan associations:

Colorado—Rev. Stat. 1963, § 122–2–20.

Wisconsin—West's Wisc. Stats. Anno., §§ 221.04(e), 215.13(39) (statute permits branch in any town completely surrounded by water and having no bank; branching otherwise limited to savings and loan association).

(6) States which do not permit branch banking or other branching facilities:

Illinois—Smith-Hurd Illinois Anno. Stats., Chap. 16½, § 106.

Minnesota—Minnesota Stats. Anno., § 48–34.

Texas—Vernon's Civ. Stats. of Tex., Anno., Art. 342–903.

West Virginia—W. Va. Code of 1961 Anno., § 3131.

Wyoming—Wyoming has no legislation authorizing branch banking.

APPENDIX C

Banks per community in Utah and the United States

(1)	(2)	(3)	(4) ((3)/(2))	(5)	(6)	(7) ((6)/(5))
Community population[1]	Utah			United States		
	Number of communities	Number of banks	Banks per community	Number of communities	Number of banks	Banks per community
Less than 10,000	206	35	0.2	14,572	9,966	0.7
10,000–25,000	6	6	1.0	539	1,222	2.3
25,000–50,000	1	2	2.0	173	523	3.0
50,000–100,000	1	5	5.0	22	132	6.0
Over 100,000	1	9	9.0	184	3,317	18.0
Total	215	57	.3	15,490	15,160	1.0

[1] The United States data for categories less than 10,000, 10,000–25,000, and 25,000–50,000 apply to nonmetropolitan area communities for 1960. The remaining two categories apply to Standard Metropolitan Statistical Area (Census Bureau definition) data for 1962. The Utah bank data are for 1966; population data, for 1960.

Sources: Bernard Shull and Paul M. Horvitz, "Branch Banking and the Structure of Competition," *The National Banking Review* (March 1964), table 16, p. 324, and table 21, p. 329; *Operating Banking Offices Insured by the Federal Deposit Insurance Corporation* as of June 1, 1966 (Washington, D.C., Office of the Secretary of the Federal Deposit Insurance Corporation, 1966); and 1960 Census of Population, vol. 1, part 46.

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